United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-1317

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P/S

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

LLOYD DIXON, JR.,

Appellant.

#75-1317

Appeal from the United States District Court
For the Western District of New York

APPELLANT'S REPLY BRIEF

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Preliminary Statement

The appellee's brief was received by appellant's counsel on Tuesday, November 18, 1975. This reply brief is filed pursuant to permission granted by the Court during the course of oral arguments on November 26, 1975.*

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* Permission will be sought to file this brief on November 26, 1975.

I

The Insufficienty of Evidence Issue

Lloyd Dixon complained in his opening brief that the Government failed to adduce sufficient proof demonstrating his knowledge of the disclosure requirements for personal loans which exceed either $20,000 (10-K) or $10,000 (proxy statement) at any time during a given year.*

The company's auditors, Ernst & Ernst, specifically advised Lloyd Dixon that the "loan rule" was a "year-end rule" and not an aggregate. In United States v. Natelli, Nos. 75-1004, 75-1008 (2d Cir., July 28, 1975), an issue was decided by that Court which bears directly on our issue. Natelli, a partner in charge of the

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* We regret several earlier errors in our opening brief which should be corrected. Lloyd Dixon was former Vice President of Rockwell Manufacturing Company. Under Lloyd Dixon's leadership, AVM's gross sales, not profits, rose from $4 million in 1964 to $43 million in 1972. The law firm of Wilmer, Cutler & Pickering participated in the investigation of the non-reporting of the Dixon loans.

Washington, D.C. office of Peat, Marwick, Mitchell & Co., a large independent firm of auditors, and Scansaroli, an employee of Peat, were convicted of violating the very same section Dixon was charged with -- §78ff(a) of Title 15 U.S.C. Natelli and Scansaroli were certified public accountants. Natelli was the engagement partner with respect to Peat's audit for National Student Marketing Corporation, while Scansaroli was assigned as the audit supervisor. On appeal, this Court held that as to Scansaroli, the evidence with regard to one of the two specifications in the count was insufficient to show that he had failed to fulfill a duty arising from his position.*

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* On October 6, 1975, this Court granted a petition for rehearing and withdrew its former determination and affirmed the conviction of Scansaroli. However, this was required because of the Circuit rule requiring counsel to specifically move to withdraw this particular specification from jury consideration where it is unsupported by adequate proof. See United States v. Mascuch, 111 F.2d 602, 603 (2d Cir. 1940). Thus, we hope it is not inappropriate that we draw the Court's attention to this case because of the reasoning that originally related to Scansaroli's case.

Although the facts of the Natelli case are rather complex, in essence, it was shown that following the issuance of the 1968 report and before the proxy statement was filed on behalf of National Student Marketing Company, seven companies were acquired in a stock exchange. In a footnote in the proxy statement, the appellant sought to reconcile the company's prior reported net sales and earnings from the 1968 report with restated amounts resulting from pooled companies reflected retroactively. There was no disclosure that over $1 million of previously reported 1968 sales and over $2 million of the $3.3 million in unbilled sales booked in 1968 and 1969 had been written off. A true disclosure would have shown that without these unbilled receivables, National Student Marketing had no profit in the first nine months of 1969.

Even though this Court found the evidence of guilt sufficient with respect to Natelli, it stated:

> "When we deal with a defendant who is a professional accountant, it is even harder, at times, to distinguish between simple errors of judgment and errors made with sufficient criminal intent to support a conviction, especially when there is no financial gain to the accountant other than his legitimate fee (July 28, 1975 at 5176)."

In the instant appeal the record bears out that Lloyd Dixon relied almost exclusively upon Ernst & Ernst and his general counsel Entwisle with respect to preparation of the proxy statement, including required disclosures (90, 91, 103, 105, 121, 136). Dixon's advisers made errors of judgment regarding the SEC rules; otherwise the proxy statements would have met the SEC content standard. For Dixon -- who is neither a lawyer nor an accountant -- to have been found guilty on such sheer evidence of his knowledge of wrongdoing when this Court has indicated a reluctance to convict an <u>accountant</u> is unjust. It must be emphasized

that Natelli's conduct consisted of omitting with full intent and knowledge necessary information from the proxy statement.

In Natelli, it was recognized that:

> "The failure to make open disclosure could hardly have been inadvertent, or a jury at least could so find, for appellants were themselves involved in determining the write-offs and their accounting treatment. The concealment of the retroactive adjustments to Marketings' 1968 year revenues and earnings could properly have been found to have been intentional for the very purpose of hiding earlier errors." (July 28, 1975 at 5178)

Here the omission of Dixon's loans from the proxy statments was wholly inadvertent; those with the responsibility for their preparation misunderstood the rule.

In Natelli, the judge charged the jury that "good faith, an honest belief in the truth of the data set forth in the footnote and entries in the proxy statement would constitute a complete defense . . . " (July 28, 1975 at 5185). As indicated in the opening brief,

Dixon's borrowing money to repay his loans to AVM in an attempt to reduce the balance to what he was led to believe by his advisers was the legal limit is a manifestation of good faith.

It is pointed out in Natelli that:

> "Congress equally could not have intended that men holding themselves out as members of these ancient professions [law and accounting] should be able to escape criminal liability on a plea of ignorance when they have shut their eyes to what was plainly to be seen or have represented a knowledge they knew they did not possess." (July 28, 1975 at 5185-86.)

Certainly, under all the circumstances of this case, the logic and reasoning of Natelli should require a reversal here.

Finally, the government seems to concede that the Court's misinstruction on appellant's responsibility as President of AVM may well be error but it is not prejudicial. We strenuously disagree and invite this Court's attention to its recent decision in United States v.

Certificate of Service

I HEREBY CERTIFY that copies of the Appellant's Reply Brief have this day been mailed to counsel for the appellee at the following address:

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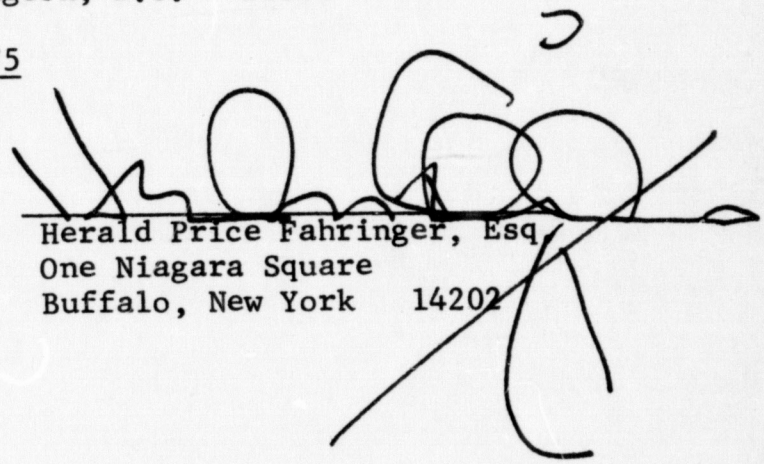
Dated: November 22, 1975



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Bright, 517 F.2d 584 (2d Cir. 1975) where the Court under far less extravagant circumstances, reversed the appellant's conviction on a misinstruction relating to the defendant's knowledge. We believe that decision should compel the same result here.

Respectfully submitted,

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